



DEPARTMENT OF THE ARMY
HEADQUARTERS UNITED STATES ARMY FORCES COMMAND
1777 HARDEE AVENUE SW
FORT MCPHERSON GEORGIA 30330-1062

REPLY TO
ATTENTION OF

AFLG-PR

13 Jul 00

MEMORANDUM FOR ALL FORSCOM Directorates of Contracting

**SUBJECT: Contracting Information Letter (CIL) 00-35, SAB Co., Protest
Regarding Rule-of-Two Decision Needs Only an Informed Business Judgment**

1. The enclosed dismissed protest, filed against an agency's determination to set aside a procurement for exclusive small business competition was denied where procurement history provided basis for reasonable expectation that offers would be received from at least two responsible small businesses and that award would be at fair market prices; contrary to protester's argument, in making set-aside decisions, agencies need not make determinations tantamount to affirmative determinations of responsibility but, rather need only make an informed business judgment.
2. For additional information, please contact Irene Hamm, email address hammi@forscom.army.mil or 404/464-5632.

A handwritten signature in cursive script, reading "Toni M. Gaines", is positioned above the typed name and title.

TONI M. GAINES
Acting Chief, Contracting
Division, DCSLOG
Acting Principal Assistant Responsible
for Contracting

**Encl
as**

SAB Company
B-283883
20 Jan 00

DIGEST

Protest against agency's determination to set aside procurement for exclusive small business competition is denied where procurement history provided basis for reasonable expectation that offers would be received from at least two responsible small businesses and that award would be at fair market prices; contrary to protester's argument, in making set-aside decisions, agencies need not make determinations tantamount to affirmative determinations of responsibility but, rather need only make an informed business judgment.

DECISION

SAB Company, a large business concern and the incumbent contractor (as part of a joint venture), protested the determination by the Naval Facilities Engineering Command (NAVFAC) to set aside for exclusive small business competition request for proposals (RFP) for supplies and services associated with change of occupancy maintenance and occupied rehabilitations of Navy housing on Guam, Mariana Islands. The protester contended that NAVFAC abused its discretion in determining that this procurement should be set aside for small businesses.

Protest denied

The Federal Acquisition Regulation (FAR) directs that an acquisition valued at more than \$100,000, as here, be set aside for exclusive small business participation where there is a reasonable expectation that offers will be obtained from at least two responsible small businesses and award will be made at fair market prices. In this regard, the decision whether to set aside a procurement may be based on an analysis of factors such as the prior procurement history and market surveys that include responses to Commerce Business Daily (CBD) announcements. PR Newswire, B-279216, 23 Apr 98, 98-1 CPD paragraph 118 at 2.

SAB maintained that the agency lacked a reasonable basis for anticipating that adequate small business competition would be received. The NAVFAC reported in response that its set-aside determination was based on procurement history, and included a CBD survey of interest. In this regard, under the unrestricted solicitation for the predecessor contract for work similar to the solicitation here, although award was made to a large business, the agency reported it received two "competitive" offers from "eligible small businesses." Further, in response to the CBD pre-solicitation notice for a prior canceled solicitation for work identical to that here, which was issued under a smaller size standard than the one applicable here (\$7 million or less in annual receipts versus \$20 million), the agency received 18 expressions of interest from small businesses. These expressions of interest included the two small businesses that had

submitted offers under the predecessor unrestricted solicitation. Finally, before the prior solicitation was canceled, the agency received nine small business offers, three of which it determined were technically acceptable, and one marginally acceptable (before discussions); the agency considered all four reasonably priced. Based on these factors, along with the increase of the size standard from \$7 million to \$20 million, the agency believed that it could reasonably expect to receive at least two small business responses, and likely more. The agency stated that its expectations were confirmed by the numerous small business offers it received in response to the current solicitation.

In its comments in response to the agency report, SAB disputed that the historical information cited by the agency supported the set-aside determination. Specifically, the protester argued that the small business responses to the predecessor unrestricted solicitation are inadequate to support the set-aside because the agency did not identify the offerors. The protester further asserted that the small business expressions of interest received in response to the pre-solicitation CBD notice for the canceled solicitation and the offers received in response to the canceled solicitation itself do not constitute valid support for the determination because there is no indication that the firms responding were responsible, and because there is no guarantee that they would actually submit offers at fair market prices. [1]

In a supplemental report, the agency responded to each of the arguments in the protester's comments. The protester opted not to submit substantive comments in response to this supplemental report, and instead orally notified the GAO that it wished to have GAO consider the protest on the basis of the existing record. Based on the existing record, the agency clearly had established that the set-aside determination was proper. For example, in response to the protester's assertion that the agency failed to identify the small business offerors under the predecessor unrestricted procurement, the agency identified the two firms, and noted that both had also expressed interest in the subsequent canceled solicitation. The agency also submitted the business clearance memorandum for the procurement, which indicated that these firms were eligible for award and had submitted reasonable prices, i.e., their proposals were rated acceptable or higher technically, based in part on experience, and their prices were below the government estimate. Finally, NAVFAC submitted detailed information from the evaluation of offers in response to the canceled solicitation (which was available at the time the set-aside determination was made) in support of its conclusion that the small business offers in fact were viable. Specifically, this information demonstrated that four small business offers were rated marginally acceptable or higher, based in part on past performance and the reasonableness of their prices.

The GAO found that the information relied upon by the agency, as discussed above, was sufficient to support its conclusion that there would be adequate small business competition to warrant a set-aside. [2] Contrary to the central thrust of the protester's arguments, in making set-aside decisions, agencies need not make determinations

tantamount to affirmative determinations of responsibility; rather, they need only make an informed business judgment that there is a reasonable expectation of receiving acceptably priced offers from small business concerns that are capable of performing the contract. American Medical Response of Conn., Inc., B-278457, 30 Jan 98, 98-1 CPD paragraph 44 at 2-3; Anchor Continental, Inc., B-220446, 6 Feb 86, 86-1 CPD paragraph 137 at 3-4; Fermont Div., Dynamics Corp. of Am.; Onan Corp., B-195431, 23 Jun 80, 80-1 CPD paragraph, 438 at 8-9. The historical information available to the agency here was sufficient to permit it to make such an informed judgment. The set-aside therefore was unobjectionable.

Protest denied

Notes

1. The SAB also argued that of the offers received on the current solicitation, at most only one was from a responsible small business and offered a fair market price. However, since the propriety of a set-aside turned on the reasonableness of the agency's expectation of adequate small business competition, the offers actually received under the solicitation were not, in themselves, determinative of whether the set-aside determination was proper.
2. The small business expressions of interest received in response to the pre-solicitation CBD notice for the canceled solicitation provided additional support for the set-aside determination. While such expressions of interest by themselves may not be sufficient to establish the likelihood small business competition at fair market prices, Ruchman and Assocs., Inc., B-275974, 25 Apr 97, 97-1 CPD paragraph. 155 at 3 n.1, here, the expressions of interest were considered only in conjunction with actual offers received under prior procurements.